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IN THE

Supreme Court of the United States

October Term, 1962

Nos. ~~[illegible]~~ and ~~[illegible]~~
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THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIRLINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and the UNITED STATES OF AMERICA,

Petitioners,

v.

SIDNEY W. POPKIN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

Nos. 738 and 851.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIRLINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

SIDNEY W. POPKIN, ET AL.,

*Respondents.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (Appendix A, Petition No. 738) is reported sub nom. as *Popkin v. Eastern Airlines, Inc.*, at 204 F. Supp. 426 (E. D. Pa., 1962). The

* Separate briefs in opposition have been filed with the Supreme Court on behalf of respondents Barrack, et al.; Rapp, et al.; Biernbaum, et al., and Laister, et al.

opinion of the Court of Appeals for the Third Circuit directing that the order of the District Court be vacated (Appendix B, p. 23a of Petition No. 738) is reported at 309 F. 2d 953. The order of the Court of Appeals for the Third Circuit (Feb. 21, 1963) amending its opinion is not yet reported but is printed in Appendix A of this Brief in Opposition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the two petitions.

QUESTIONS PRESENTED.

1. The District Court lacked the power to transfer the instant cases.

2. Transfer of the instant cases to Massachusetts would frustrate a determination by the forum in which the victims and their next of kin are domiciled as to the public policy and faith and credit to be accorded the penal provisions of the Massachusetts Death Statute.

3. Fact finders in the transferee forum could not be expected to make adequate and just awards to the respondents should the Pennsylvania rule of compensatory damages be adopted when, under the law of the forum, they would be compelled to limit recoveries under penal principles to their own domiciliaries.

4. The District Court abused its discretion under 28 U. S. C. A. Sec. 1404(a) by failing to consider the statutory criteria as applied to the total factual situation applicable to this litigation. There are no surpassing considerations to alter the plaintiffs' right to choose the forum of their domicile.

5. Pennsylvania has the most significant contacts with the parties. It is the plaintiffs' natural forum, residence and domicile. It is the place where the contract for transportation was made, where it had commenced and was to terminate. These cases are clearly distinct from those pending in Massachusetts which involve domiciliaries of that state and passengers southbound from Boston.

STATUTE INVOLVED.

Sec. 1404(a) of the Judicial Code, 28 U. S. C. 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

On October 4, 1960, an Eastern Airlines Lockheed Electra airplane crashed into the navigable waters of Boston Harbor immediately following take-off from a runway at Logan International Airport, Boston, Massachusetts. The ill-fated flight was en route to Philadelphia, Pennsylvania, and points south. Aboard the plane were sixty-seven passengers and a crew of five. Fifty-nine passengers and three crew members sustained fatal injuries. Nine of the ten survivors received serious bodily injuries. The aircraft was totally destroyed.

All the respondents but one are the personal representatives of passengers who lost their lives in the crash. Respondent Popkin is one of the few survivors.[1]

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1. This Brief in Opposition is presented only on behalf of respondents Sidney W. Popkin, et al. (United States Court of Appeals, 3rd Cir., No. 13997). Briefs in opposition have been filed separately with the Supreme Court by respondents Barrack, et al.; Rapp, et al.; Biernbaum, et al.; and Laister, et al.

Pennsylvania is the domicile of the personal representatives of the estates of the decedents in every case but two.[2]

As a result of the crash respondents filed suits in the United States District Court for the Eastern District of Pennsylvania on behalf of the decedents and the injured passengers against the corporate defendants (Eastern Airlines, Inc.; Lockheed Aircraft and General Motors Corporation). In addition, separate suits have been instituted against the United States under the Federal Tort Claims Act. All the defendants are doing business or have agreed to the acceptance of service of process within the Eastern District of Pennsylvania and have been duly served.

Altogether fifty-five cases involving fatal and non-fatal injuries were instituted in the Eastern District of Pennsylvania by all the respondents against the corporate defendants and the United States.

Over the unanimous objection of plaintiff-respondents in all fifty-five actions, defendant-petitioners' motions for transfer under 28 U. S. C. A., Sec. 1404(a) to the United States District Court of Massachusetts were granted by petitioner, the Honorable Francis L. Van Dusen, District Judge.

Upon application to the Court of Appeals a Writ of Prohibition was granted reversing the transfer order, the Court of Appeals holding that the District Court did not have the power to transfer these actions to Massachusetts.

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2. In Attilio E. Abate, Administrator of the Estate of Frederick N. Abate, Deceased v. Eastern Airlines, et al. (Civil Action No. 30300, E. D. Pa.), the decedent and the personal representative were domiciled in Boston, Massachusetts, and the personal representative qualified in that state. (This suit was excepted from the order of the Court by consent of counsel.) In Diane Braff, Administratrix ad Prosequendum and as General Administratrix of the Estate of Bernard Jay Braff, Deceased v. Eastern Airlines, et al. (Civil Action No. 29884, E. D. Pa.), the decedent was and his personal representative is domiciled in nearby New Jersey, but there are substantial and significant conflict of law contacts relating to the decedent's transportation arising in the City of Philadelphia, which will be referred to hereinafter.

As a result of the crash one hundred fourteen suits were instituted on behalf of decedents and survivors in Massachusetts. These Massachusetts actions, with but few exceptions, involve decedents and personal representatives domiciled in Massachusetts, the latter having been qualified to administer the estates of decedents under the laws of Massachusetts. The Massachusetts instituted suits arise out of transportation contracts made in Massachusetts for air travel to commence in Boston for destinations southbound, including Philadelphia, Pennsylvania; Charlotte, North Carolina; Greenville, South Carolina; and Atlanta, Georgia.

In the instant cases, on the other hand, including all fifty-five actions, the contract of transportation was entered into in Philadelphia, Pennsylvania, for air travel to Boston and return air travel to Philadelphia. With but one or two exceptions the Eastern District of Pennsylvania is the domicile of the decedents and their personal representatives. It is likewise the residence of their decedents and witnesses to their professional, business and financial capabilities. With but one or two exceptions the personal representatives were appointed by Pennsylvania Courts; none received any Letters of Administration from any Probate Court of Massachusetts, and only one is qualified as a personal representative in Massachusetts.[3] But for

3. Through inadvertence of counsel two of the suits against the United States of America (Diane Braff, Administratrix ad Prosequendum and as General Administratrix of the Estate of Bernard Jay Braff, Deceased v. United States, Civil Action No. 30304 (E. D. Pa.), and Edna E. Long and Laura Manney, Administratrices of the Estate of Shirley E. Reitz, Deceased v. United States, Civil Action No. 30303 (E. D. Pa.), which the plaintiffs conceded to have been commenced in an improper venue under 28 U. S. C. A., Sec. 1402(b) were included in the application for the Writ of Prohibition. These actions were deleted subsequently (see amendment to Court of Appeals opinion, Appendix A), and applications for ancillary administrations are being processed in Massachusetts preliminarily to effecting a transfer of these actions to that jurisdiction. Reference by petitioners to these two cases as demonstrating an inconsistency in the opinion of the Court of Appeals is misleading and inaccurate.

three of the actions all the beneficiaries entitled to the benefits because of the untimely and wrongful deaths of the decedents are domiciliaries of Pennsylvania.

In addition to the interpretation of 1404(a) the respondents argued in the courts below that: (1) the trial judge abused his discretion afforded him under 1404(a) by failing to consider the statutory criteria as applicable to the total factual situation pertinent to this litigation; (2) there were compelling legal and factual distinctions separating these actions from the Massachusetts actions, thereby requiring that these suits remain in Pennsylvania.

One of the most compelling considerations urged by respondents in requesting the Court of Appeals to stay and reverse the transfer order of the District Court was to permit a court of the forum of the domiciliary (Pennsylvania) to determine if under Pennsylvania law, similar to that of New York, the State of Pennsylvania would likewise refuse to recognize the harsh and punitive features of the Massachusetts statute. Moreover, it was contended that even if the transferee jurisdiction (Massachusetts) could and would make such a determination, nevertheless the triers of facts and assessors of damage in Massachusetts could not be fairly expected to render fair awards to respondents in view of the irreconcilable standards that would have to be applied to Massachusetts victims as opposed to "outsiders" from the State of Pennsylvania.

REASONS WHY THE PETITION SHOULD BE DENIED.

I. The District Court Lacked Power to Transfer the Instant Cases.

The Court of Appeals was of the unanimous opinion that the District Court lacked the power to transfer these cases because the plaintiffs did not have an unqualified right to bring these actions in Massachusetts. The Court of Appeals therefore granted the Writ of Prohibition without finding it necessary to reach the question of abuse of discretion.[4] In order to avoid duplication, the legal argument in support of the opinion of the Court of Appeals is not discussed in this Brief in Opposition. This particular issue as raised and decided by the Court of Appeals will be and is discussed at length in the briefs in opposition as presented to this Court by respondents Rapp and Biernbaum. In this brief we shall devote our attention to those issues not passed upon by the Court of Appeals which independently compel the granting of a Writ of Prohibition against the transfer of these cases.

II. Transfer of the Instant Cases to Massachusetts Would Frustrate a Determination by the Forum in Which the Victims of the Air Crash and Their Next of Kin Are Domiciled as to the Public Policy and Faith and Credit to Be Accorded the Penal Provisions of the Massachusetts Death Statute.

Massachusetts is one of the two states in this country (Alabama being the other state) that limits recovery for wrongful death to punitive and not compensatory damages.

4. Said the Court of Appeals (p. 24a of Petition No. 738): ". . . Lastly, they (plaintiffs) contend that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have the power to transfer these actions, we find it unnecessary to consider petitioners' alternative argument."

Under the general provisions of the Massachusetts Death Act (G. L. (Ter. Edition) Ch. 229, Sec. 2d, as amended, 7a-Ann. Laws of Mass. 407) recovery for wrongful death is punitive in nature and not compensatory. This Act provides that one (including a common carrier) who negligently causes the death of another "shall be liable in damages in the sum of not less than $2,000 nor more than $20,000 to be assessed with reference to the degree of his culpability or that of his agents or servants."

In *Massachusetts Bonding and Insurance Co. v. United States*, 352 U. S. 128, 129, 132 (1956), this Court held:

> "The assessment of damages with reference to the degree of culpability of the tortfeasor, rather than with reference to the amount of pecuniary loss suffered by the next of kin, makes those damages punitive in nature.
>
> • • •
>
> ". . . The standard of liability under the Massachusetts Death Act is punitive—i.e. 'with reference to the degree' of culpability—not compensatory."

The penal limitations of the Massachusetts Death Act oppose the almost universally accepted criterion that the dependents and next of kin of an innocent victim of a civil wrong should be compensated for their loss of support and benefits from the wrongdoer. The penal provisions of the statute have been held to be a sufficient affront and incompatible with the public policy of the state in which the victims of air crashes are domiciled so as to require their rejection. This was the result reached in two recent decisions that have claimed nationwide attention. In *Kilberg v. Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), the plaintiff's decedent was killed in an airplane crash in Nantucket, Massachusetts. The decedent as well as the plaintiff representative were New York domiciliaries. Suit was brought in the New York State Court.

The New York Court of Appeals held the damage features of the Massachusetts Death Act were incompatible with the public policy of New York. Said the Court (9 N. Y. 2d 40):

> "For our courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law."

In *Pearson v. Northeast Airlines*, — F. 2d — (2nd Cir., Nov. 8, 1962), 8 Avi. 17,234, cert. denied — U. S. —, 31 L. W. 3259 (week of Feb. 19, 1963), the Massachusetts Death Statute was considered by the Second Circuit as it applied to a New York victim and his next of kin. The original panel held that New York must apply and enforce the Massachusetts punitive limitation statute. The Court, upon a rehearing, sitting en banc, reversed and reached the same conclusion as did the Court of Appeals of the State of New York in the *Kilberg* case. It forcefully endorsed the proposition that a federal court sitting in New York, the domiciliary state, could refuse for reasons of public policy and morality to apply the provisions of the Massachusetts Death Statute which limited recovery to punitive damages. The Court also held that neither full faith and credit nor due process was violated by refusing to enforce these limitations of the lex loci delecti.

Upon reflection it becomes obvious that the true motive behind corporate petitioners' motion to transfer is not an attempt to avoid two trials but an attempt to obtain the benefit of the penal limitations provisions of the Massachusetts Wrongful Death Act as to these plaintiffs.

II-A. Forum of the Domicile of the Victims, Their Dependents and Next of Kin Should Decide Policy Towards Penal Limitations of Massachusetts Act.

The *Kilberg* and *Pearson* decisions demonstrate the concern of the courts over the policy to be adopted toward

their domiciliaries. No other forum can appropriately determine this policy. This Court has recognized that a forum which has significant contacts with the parties may determine the law which shall govern the amount and measure of damages in foreign death actions and not the law of the place where the fatal injury was inflicted. Thus, in *Richards v. United States*, 369 U. S. 1 (1962), the Court took cognizance of the emerging conflicts of law rule holding at p. 12:

> "Recently there has been a tendency on the part of some states to depart from the general rule in order to take into account the interests of the state having significant contact with the parties to the litigation."

In the instant case Pennsylvania is: (1) the domicile of the personal representatives of the estates of the decedents as well as the domicile of the decedents and their next of kin; (2) the place where the contract of transportation by air was entered into; (3) the place where the transportation had commenced and where it was to have been concluded; (4) the en route destination of the aircraft at the time of the crash; (5) the residence of almost all of the witnesses as to the decedents' health, status, family relationships, professional, business and financial capabilities. Pennsylvania is therefore the forum which has a paramount and substantial interest in the application of the laws and public policy to be accorded these victims and their dependents and next of kin.

As the forum with such significant contacts, it may exercise a choice of conflicts of law rules subject only to constitutional restrictions. The full faith and credit clause does not compel a state to adopt any particular set of rules of conflicts of law. It merely sets up certain minimum requirements which each state must observe when asked to apply the law of the sister state. *Wells v. Simonds Abrasive Co.*, 345 U. S. 514 (1953).

It is especially significant to observe that Pennsylvania has a constitutional provision (Art. III, Sec. 21) similar to that of the State of New York (Art. I, Sec. 18) which prohibits any limitation upon the amount of recovery for injuries resulting in death or personal injury. The Pennsylvania courts refuse to enforce the penal laws of other states. *Commercial National Bank v. Kirk*, 222 Pa. 567 (1909). A penalty is regarded as anything a defendant is compelled by law to pay a plaintiff other than what is necessary to compensate the plaintiff for the legal damages caused him by the defendant. *Nesbitt v. Clark*, 272 Pa. 161 (1922), cert. denied 258 U. S. 621. Pennsylvania courts will not enforce the substantive law of the lex loci delecti if they regard such law as immoral and contrary to its public policy. *Stull's Estate*, 183 Pa. 625 (1898).

There is every reason to expect, therefore, that the *Kilberg* and *Pearson* decisions will receive favorable judicial recognition in Pennsylvania.

A forum sitting in Pennsylvania, steeped in its basic law and legal philosophies, should be the one to delineate the public policy of that state towards a foreign death statute which has such an adverse impact upon its domiciliaries as the death statute of Massachusetts. Certainly it should not be a forum in the state whose public policy has sponsored the law under challenge.

III. Fair and Just Awards Could Not Be Made by a Massachusetts Jury Under Pennsylvania Principles of Compensatory Damages.

Moreover, even if the transferee forum could recognize a double standard towards nonresident victims as opposed to its own domiciliaries, is it expectable that a Massachusetts jury could make a just and fair award in favor of the plaintiffs? Not only would the triers of the fact have to overcome their familiarity with and acceptance of a rule for death actions which applies in their native state, but they would be called upon to find in favor of "outsiders"

substantial awards which perforce under the Massachusetts Act they must deny to their own citizens. Such irreconcilable standards could only result in a substantial and unjust diminution in the recovery of damages to which the instant plaintiffs would be entitled.

IV. The District Court Abused Its Discretion Under 28 U. S. C., Sec. 1404(a) by Failing to Consider the Statutory Criteria as Applied to the Total Factual Situation Applicable to This Litigation.

The courts have always adhered to the general guiding proposition that as the plaintiff's choice of forum is a fact of high significance, especially where it coincides with his domicile, such choice should rarely be disturbed and then only upon a showing by the defendant that the balance of convenience is overwhelmingly in favor of transfer. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947). Courts have repeatedly held that the balance of convenience must be strongly in favor of the moving party before a transfer will be ordered. *Koster v. Lumbermen's Mutual and Casualty Co.*, 330 U. S. 518, 524 (1947); *Padgett v. Atlantic Greyhound Corp.*, 126 F. Supp. 124 (W. D. Pa., 1954); *Davis v. American Viscose Corp.*, 159 F. Supp. 218 (W. D. Pa., 1958); *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (3rd Cir., 1950), cert. denied 340 U. S. 851.

Cognizant of the fact that almost every case involving multiple deaths resulting from an air crash raises the issue of transfer due both to the widespread nature of the activities of the usual defendants in these cases and to the fact that generally the passengers come from several states, many courts have been loath to grant transfer where the plaintiff's chosen forum is also his residence and/or domicile.

The case of *Bush v. United Airlines*, 148 F. Supp. 104 (S. D. N. Y., 1956), involved a New York decedent who was killed in an air crash in Wyoming. Suit was brought in

New York, and the defendant airlines sought transfer under 28 U. S. C. 1404(a). Said the Court:

"Unless the balance of convenience is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. See Ford Motor Co. v. Ryan, 2nd Cir., 182 F. 2d 329, 330, cert. denied 1950, 340 U. S. 851, 71 S. Ct. 79, 95 L. Ed. 624; Belair v. New York N. H. and H. R. Co., D. C. S. D. N. Y. 1950, 88 F. Supp. 572. Here, the plaintiff has properly exercised the venue privilege by initiating this action before this court. I have failed to find any substantiation for the defendant's argument that the plaintiff has chosen this forum on the basis of a 'shopping tour.' On the contrary, the plaintiff has all the cogent reasons possessed by a litigant acting with complete forthrightness. This action is a matter of grave concern to her and to her infant children. She has serious burdens of a legal and practical nature to sustain in the ensuing litigation. She can accomplish her task with far greater convenience here, where she is making her home with her children and earning her livelihood, than in Cheyenne, Wyoming, to which she is an utter stranger. This consideration is emphasized by the probable extended length of the trial which can take from two weeks to two months to try. *There is not even suspicion of harassment in her initiation of the suit in this district.* See Lewis v. American Airlines, Inc., D. C. S. D. N. Y., 1950, 91 F. Supp. 31, 33.

"The defendant is engaged in an extensive, nation-wide business of transporting passengers by air. In operating a business of this nature, it is reasonable to expect the defendant to anticipate the hazard and expense of suits filed against it at various points over the territory in which it operates. Moreover, the defendant should expect that such suits will require the transportation of such of its employees as it must call as witnesses to the places of trials. *The matter of*

transportation of witnesses would pose a problem more easily solved by the defendant than by the plaintiff. The fortuitous circumstance that this accident occurred through collision with a mountain in Wyoming should not operate to deprive the plaintiff of her choice of forum.

"In support of its motion to transfer this action the defendant has also argued that a possible consolidation of the plaintiff's action with other pending actions in Wyoming, arising out of the same accident, will lighten the burden of this court as well as those of the defendant. This may well be. But the transfer here sought cannot be justified by such an arrangement of convenience. A transfer of the plaintiff's action to Wyoming upon such considerations would be tantamount to a bargain of convenience at the expense of the plaintiff. The plaintiff has properly invoked the jurisdiction of this court and has come forward with sufficient reasons demonstrating that her choice of forum should not be disturbed. Motion denied." (Emphasis supplied.)

Other cases have noted that defendant transportation companies can easily transport witnesses.[5]

Lewis v. American Airlines, Inc., 91 F. Supp. 31 (S. D. N. Y., 1950), was a case in which the court denied defendant's motion to transfer to the state in which the crash occurred. The crash occurred in Texas, and the plaintiff resided in New York. Said the Court:

"On the whole, admitting that defendant will be inconvenienced by having to produce in New York a number of witnesses from distant places, and that it may be costly to it, still the equities, it seems to me, are the other way. Plaintiffs will be more than incon-

5. *Hohler v. Pennsylvania R. Co.*, 140 F. Supp. 487, 489 (D. C. Pa., 1956); *Naughton v. Pennsylvania R. Co.*, 85 F. Supp. 761, 763 (D. C. Pa., 1949).

venienced if the trial is moved to Texas. It will be a real hardship to them. It might very well prejudice their case. They may not be able to properly prove their case against defendant. They will have no way to compel their New York witnesses to go to Texas. Balancing the equities I feel that in the interest of justice the trial should be had in New York. *This is not a case where the plaintiff has picked an inconvenient forum to vex, harass or oppress the defendant by inflicting upon it expense or trouble not necessary to their rights to pursue their remedy. This is the natural forum for plaintiffs to start their action. It is their home, their residence and domicile.* Defendants must make out a stronger case than they have to change it." (Emphasis supplied.)

There are many other cases in which a court in refusing transfer has emphasized that the original district chosen is the residence of the plaintiff.[6]

The statement of facts in the instant fifty-five actions reveals that these cases are on all fours with the decisions in *Bush* and *Lewis, supra.*

V. The Eastern District of Pennsylvania Is a Convenient Forum to Try the Instant Cases.

At first blush it may appear that Massachusetts is a more convenient forum in which to try the instant cases.

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6. *Schindelheim v. Braniff Airways, Inc.*, 202 F. Supp. 313, 315 (S. D. N. Y., 1962); *General Courtland Cement Co. v. Perry*, 204 F. 2d 316 (7th Cir., 1953); *Cooper v. Camp Pinecrest, Inc.*, 175 F. Supp. 817 (D. C. N. Y., 1959); *Davis v. American Viscose Corp.*, 159 F. Supp. 218 (D. C. Pa., 1958); *Tyrill v. Alcoa S. S. Co.*, 158 F. Supp. 853 (D. C. N. Y., 1958); *Jenkins v. Wilson Freight Forwarding Co.*, 104 F. Supp. 422 (D. C. N. Y., 1952); transfer from plaintiff's residence to district where neither litigant resided refused, *First National Bank of Boston v. Fidelity and Deposit Co. of Md.*, 107 F. Supp. 894 (D. C. Mass., 1952); *Mason v. Chicago R. I. and P. R. Co.*, 96 F. Supp. 361 (D. C. Mo., 1951); *Millar Bros. and Co. v. Pennsylvania R. Co.*, 106 F. Supp. 532 (D. C. Pa., 1952).

A closer examination, however, of the complicated factual situation involving all of the parties defendant will disclose that the advantages of convenience in favor of trial in Massachusetts are not substantial. In the event that the Pennsylvania rule of damages is determined to be applicable, then the forum of convenience would be overwhelmingly Pennsylvania.

There is little dispute as to the manner in which the aircraft crashed after take-off. The number of eyewitnesses who as ground observers witnessed the brief crash episode will contribute little to the outcome of this litigation. On the other hand, the cause for the airplane moving in its course, its failure to recover, its control features, operational practices and the nature and extent of the injuries inflicted upon the passengers involve many causative factors of design, manufacture, assembly, construction, testing, inspection and instrumentation. Relevant, too, are development and compliance with standards and specifications and the adequacy of operational and maintenance instructions. The situs of these facts and the location of the witnesses possessing knowledge thereof are distant from Massachusetts and the scene of the air crash.[7] These are the factors which encompass the entire liability of Lockheed, General Motors and part of the claim against the United States and Eastern Airlines. See *Schindelheim v. Braniff Airways, Inc., supra,* involving another Lockheed Electra crash wherein transfer was refused.

The expert witnesses who examined the aircraft and its components following the crash and investigated the various phases of the mishap are mostly nonresidents of Massachusetts. The Government members of the Civil Aeronautics Board investigating staff are required by regulations to testify by depositions (14 C. F. R., Part 311c). Those investigating and representing the interests of the other defendants reside in New York, California and

7. See "Plaintiffs' Answer to Motion for Change of Venue Pursuant to 28 U. S. C. A., Sec. 1404(a)," Supplemental Appendix B.

Indiana. Besides several ornithologists from the local area and the personnel who attended the aircraft before take-off, there are a few local residents possessing knowledge of important and relevant facts. Of the survivors of the crash three were from Massachusetts, three from Pennsylvania, two from South Carolina, one from Mississippi and one from Florida. *Extensive changes* made to the runways, adjacent areas and pertinent taxiways at the Logan International Airport since the accident have rendered any view of the scene of little value to a jury's understanding of the circumstances and conditions which existed on the day of the crash.[8]

It is evident, therefore, that no substantial advantage accrues in selecting Massachusetts over Pennsylvania as the trial forum from the standpoint of availability or convenience to the witnesses on the issues of liability.

On the other hand, on the damage issue, as to all of the Pennsylvania claimants, there will be extreme hardship in producing witnesses regarding the victims' respective states of health, professional and financial capabilities, family and dependency relationships.[9] Besides the difficulty and convenience of producing and subpoenaing such witnesses at the trial, the burden and expense of transportation would be prohibitive. On the other hand, courts have taken cognizance of the fact that the defendants, engaged as they are in the business of aviation, can readily transport witnesses anywhere in the country with little heed to fare expense. See *Bush v. United Airlines, supra.*

VI. The Instant Cases Are Clearly Distinct From Those Pending in Massachusetts.

In the statement of facts of this case we have alluded to the distinct grouping of the cases affecting the victims

8. Affidavit of Milton M. Borowsky, Supplemental Appendix C.

9. Affidavits of Thelma Freeman, Mary B. Grice, Edna E. Long and Laura R. Manney, and Dorothy Weinstein, Supplemental Appendix D.

of the air crash which are pending in the State of Massachusetts as opposed to the instant cases. On the one hand the victims were domiciled in the State of Massachusetts; their dependents and next of kin reside there; the contract of transportation was entered into in Massachusetts; the transportation was to commence there, and if not a round trip flight, was to terminate at some point outside of their home jurisdiction.

. . . On the other hand, a large portion of the passenger quota involves victims, and their dependents and next of kin domiciled in Pennsylvania, and contracts for transportation made in Pennsylvania for a flight which began and was intended to end in that state.

There is no sound reason to deny to each distinct group of victims access to their native jurisdictions to determine the rights and liabilities of the parties. In the light of the catastrophe and large number of victims involved, we submit trial in the two forums is the only equitable and economical solution to achieve justice for all the parties.

CONCLUSION.

Petitioners' application for writ of certiorari should be denied because: (1) The significant points of contact distinctly set apart these actions from those brought in Boston which for the most part involve victims domiciled in Massachusetts who boarded the aircraft for an initial flight to points south of Boston. (2) The decisions of *Pearson v. Northeast Airlines, supra,* and *Kilberg v. Northeast Airlines, supra,* disclose a current trend in conflicts of law allowing the domiciliary forum to refuse enforcement of the penal provision of the Massachusetts Death Statute. (3) The decision as to the faith and credit to be accorded the Massachusetts Death Statute should be made by a forum concerned with the policy it shall choose to adopt towards its domiciliaries and not a forum in the state under whose public policy such a statute was enacted.

(4) A jury in the transferee forum, barred from awarding adequate damages to its own domiciliaries, could not be expected to render adequate and just awards to the plaintiffs even if the transferee jurisdiction should determine that the Pennsylvania rule of compensatory damages applied to the plaintiffs. (5) Bearing in mind the multifarious nature of the issues of liability as it affects all of the defendants, there is absent any substantial advantage, from the standpoint of the location of the witnesses, to a trial in Boston over one in Philadelphia, and the plaintiffs' choice of forum should not be disturbed, especially where it is their home, residence and domicile. (6) Any advantage which might obtain from a consolidation of these cases with those pending in Boston is of no consequence when measured against the prejudice and irreparable loss of valuable rights which the respondents would suffer by the transfer.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MORRIS S. FINKEL,
FREEDMAN, LANDY & LORRY,
Attorneys for Respondents.

SUPPLEMENTAL APPENDIX "A".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

RAPP, ADMINISTRATOR, ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

It is ORDERED that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

"What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three

suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set aside. Subsequently counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By THE COURT

STALEY
Circuit Judge

Dated: February 21, 1963

SUPPLEMENTAL APPENDIX "B".

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29884
THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 30301
MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION. and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29882

EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29881
SIDNEY W. POPKIN *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 28664
JOSEPH THOMPSON, JR., Administrator of the Estate of LETHA MAE THOMPSON, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 30344
DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29883

ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 30300
THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30306
MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30302
SIDNEY W. POPKIN *v.* UNITED STATES OF AMERICA *v.* EASTERN AIRLINES, INC.	Civil Action No. 29901
JOSEPH THOMPSON, JR., Administrator of the Estate of LETHA MAE THOMPSON, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30343

DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30305
EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30303
DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30304
ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30307

PLAINTIFF'S ANSWER TO MOTION FOR CHANGE OF VENUE PURSUANT TO 28 U. S. C. A., SEC. 1404(A).

1. The instant action asserts a right to recover against the above-named defendants for negligence, breach of contract of safe carriage and breach of warranties, the alleged violations of which took place at various situ outside of the place where the crash occurred. As to the defendants, General Motors Corporation and Lockheed Corporation, none of the alleged acts or omissions of negligence and breaches

of warranties originated in Boston, Massachusetts; as to Eastern Airlines and the United States of America, some but not all of the acts and omissions of negligence and alleged breaches of contracts and warranties occurred in Massachusetts.

2. The instant action likewise involves a contract for return transportation by air, which contract was entered into in the Commonwealth of Pennsylvania and is to be interpreted and construed in accordance with the laws of the said Commonwealth.

3. This Court has undisputed jurisdiction over the parties and the subject matter, although the United States has objected to venue in regards to three of the plaintiffs.

4. The eyewitness accounts of the occurrence in this case is of relatively minor importance. There can be no serious dispute as to the course, altitude, attitude and manner of the flight of the aircraft after take-off until its crash into the Boston Harbor.

The expert witnesses who examined the aircraft following the crash and investigated the various phases of the mishap are practically all non-residents of the State of Massachusetts. Those who were employed by the United States may testify solely through depositions (14 C. F. R., Part 311(c)); the other parties to the investigation were as follows:

F. H. Steuber, Allison Division, Indianapolis, Indiana;
Richard T. Burris, Lockheed, Burbank, California;
Jack Real, Lockheed, Burbank, California;
William R. Howard, Eastern, 10 Rockefeller Plaza, New York City.

The non-governmental representatives of the witness group were:

Gene Van Cleve, Allison Division, Indianapolis, Indiana;
John A. Margwarth, Lockheed, Burbank, California;
Neil Mangold, Eastern, Boston, Massachusetts.

In addition to eyewitnesses and experts (exclusive of those who examined the birds, all but one of whom resided in Massachusetts, and such witnesses who had tended the aircraft and/or runway), the following witnesses testified at the CAB Hearing:

Warner Ely, Van Nuys, California:
Jack Real, El Marino, La Crescenta, California;
C. R. Mercer, Burbank, California;
William Stephens, Elmhurst, New York;
David G. Howe, Miami Springs, Florida;
Captain Frank Kearn, Coral Gables, Florida;
John W. Cobb, Miami, Florida;
James F. Byrne, Boston, Massachusetts;
Eugene E. Ervin, Indianapolis, Indiana;
Robert W. Hicks, Allison, Indianapolis, Indiana;
John M. Holland, Miami, Florida.

In addition to the above-named the following occupants of the plane survived and are presumably available as witnesses:

Arthur Glick, Philadelphia, Pennsylvania;
Harold Hewell, Greenville, South Carolina;
Major Sylvester Koenig, Greenville, South Carolina;
Richard Nix, Sudbury, Massachusetts;
Albert Nordin, East Bridgewater, Massachusetts;
Dudley A. Ward, Wallingford, Pennsylvania;
James Reid, Groton, Massachusetts;
Joan Berry, Prentiss, Mississippi;
Patricia Davies, Jacksonville, Florida;
Sidney Popkin, Bristol, Pennsylvania.

5. The dependents and the next of kin of the decedent reside in the Eastern District of Pennsylvania.*

6. The business and professional associates of the decedent are residents of the Eastern District of Pennsylvania.

7. The defendants have the financial ability to bring witnesses into this district without it assuming onerous proportions. The financial burden on the plaintiffs, on the other hand, to produce witnesses in Massachusetts would be extremely harsh and burdensome.

8. The fact that an early trial date may obtain in Massachusetts militates against the interests of the plaintiff in this particular case and makes transfer unnecessary and injust. Due to the complexity of the factual issues involved in this relating to design, construction and instrumentation of the aircraft and its mechanical parts, the plaintiff requires an opportunity for full and adequate discovery, which, of necessity, will require a substantial amount of time. The court may take cognizance that more than six months' delay already has occurred between filing the first set of interrogatories and obtaining answers thereto from the defendant General Motors Corporation in the case of Pdpkin v. Eastern Airlines, et al., Civil Action No. 28664, and despite this delay, the sufficiency of the answers to many of the interrogatories is now before this Court. Therefore, to require the plaintiff to proceed to trial without adequate discovery would obviously benefit the defendants and irreparably prejudice the rights of the plaintiff. Under these circumstances, therefore, the fact that a case may be

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* Diane Braff, mother of Bernard Jay Braff, resides in Camden, New Jersey, and her deceased son was employed in Pennsauken, New Jersey.

The decedent Shirley Reitz resided in Havertown, Delaware County, and was trained and employed in and about Philadelphia and Delaware Counties.

The decedent Frederick N. Abate resided and was educated in Massachusetts, where his next of kin reside.

expected to reach trial within 18 months after issue in Massachusetts is not in the interest of the plaintiff, nor does it serve the ends of justice.

9. The Death Statute of Massachusetts, applicable to a case such as this, does not allow recovery for compensatory damages. It is wholly punitive in nature, and the maximum amount recoverable is $20,000. The punitive features of this statute and the limitation on the amount of recovery is not recognized by the United States of America with respect to its liability under the Federal Tort Claims Act. However, as to the other defendants herein, whether or not the punitive features and limitations of the statute will be followed or ejected will depend upon the policy of comity in the light of recent decisions affecting interstate transportation by air as construed by the state of the domicile of the decedent and of his dependents and next of kin; by the state in which the contract of carriage originated. This construction will be made by the forum in which the case is tried. The transfer of this case to Massachusetts would, for all practical purposes, deprive the plaintiff of an opportunity to have these rights determined by a proper tribunal in view of the declared policy of Massachusetts evident by the said statute, and relegate him to a grossly inadequate redress solely by reason of the fortuitous locale of the tort.

FREEDMAN, LANDY AND LORRY,

By MILTON M. BOROWSKY,

Attorneys for Plaintiff.

SUPPLEMENTAL APPENDIX "C".

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*:

MILTON M. BOROWSKY, being duly sworn according to law, does hereby depose and state that he is counsel for the plaintiffs; that he has had occasion to visit, and use as a passenger, the facilities of the Logan International Airport in Boston, Massachusetts, since the date of the subject air crash, to wit, October 4, 1960; that he personally knows and has information that extensive changes and reconstruction have been done to the runways and aprons of the runways used by jet planes at the said airport; that the taxiway to the Eastern Airlines hangar has been reconstructed since the aforesaid date, that partial reference to these alterations appear in the City Record, Official Chronicle of Boston Massachusetts Affairs, Vol. 53, No. 9, at p. 153, dated March 4, 1961; that he inspected the wreckage of the said aircraft at Hingham, Massachusetts, on April 29, 1961, at which time he was advised that on or about the following day the said wreckage would be removed and the remnants disposed of; that through representatives who inspected the remains of the disassembly of the four turbo-prop engines on June 26, 1961, following an order of this Court, which was accomplished at the LaGuardia Airport, deponent has been advised, and therefore states, that the four engines and propellers which had been shipped to the Allison Division, General Motors Corporation, after the crash, for examination and testing, were, on the said date of June 26, 1961 completely disassembled and their component part intermingled so as to frustrate

any reasonable inspection of the engines or the parts relevant to any specific engine.

MILTON M. BOROWSKY

Sworn to and subscribed before me this 11th day of December, 1961.

/s/ SYLVIA GLASSMAN,
Sylvia Glassman,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires January 25, 1965.

SUPPLEMENTAL APPENDIX "D".

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DELAWARE } *ss.:*

THELMA P. FREEMAN, being duly sworn according to law, does hereby depose and state that she is a citizen and resident of Delaware County, Commonwealth of Pennsylvania, and, together with Provident Tradesmens Bank and Trust Company, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, has been appointed co-executor of the estate of her husband, Addison B. Freeman, Jr., deceased, having been appointed by the Register of Wills of Delaware County, Commonwealth of Pennsylvania, and she avers, on information and belief, that said Addison B. Freeman, Jr., purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date he boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief she avers that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing Addison B. Freeman, Jr. to suffer severe and disabling injuries resulting in his death; upon information and belief deponent avers that almost all of the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of his death, including the members of his family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia and/or Delaware Counties of Pennsylvania; upon information and belief deponent avers that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponent, precluding the production

of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of Addison B. Freeman, Jr.; that upon information and belief deponent avers that it will take a long period of time to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design, assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponent avers contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponent's claim which would prejudice deponent's right therein; deponent avers faith and confidence in deponent's attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponent has chosen as the direct and exclusive representative in the prosecution of deponent's claim; deponent further avers, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should apply the Pennsylvania law which prescribes no such limitation; in this regard, deponent further avers, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the

real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of Addison B. Freeman, Jr., while to transfer the trial to Boston, Massachusetts, would not in any adequate measure raise this crucial question for disposition which deponent avers is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ THELMA FREEMAN

Sworn to and subscribed before me this 8th day of December, 1961.

/s/ P. LESTELLA MELORUM,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires May 20, 1962.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF MONTGOMERY } *ss.:*

MARY B. GRICE, being duly sworn according to law, does hereby depose and state that she is a citizen and resident of Montgomery County, Commonwealth of Pennsylvania, and has been appointed executrix of the estate of her husband, David S. Grice, deceased, by the Register of Wills of Montgomery County, Commonwealth of Pennsylvania, and she avers, on information and belief, that said David S. Grice purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date he boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief she avers that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing David S. Grice to suffer severe and disabling injuries resulting in his death; upon information and belief deponent avers that almost all of the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of his death, including the members of his family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia and/or Montgomery Counties of Pennsylvania; upon information and belief deponent avers that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponent, precluding the production of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of David S. Grice; that upon information and belief deponent avers that it will take a long period of time

to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design, assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponent avers contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponent's claim which would prejudice deponent's right therein; deponent avers faith and confidence in deponent's attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponent has chosen as the direct and exclusive representative in the prosecution of deponent's claim; deponent further avers, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should appiy the Pennsylvania law which prescribes no such limitation; in this regard, deponent further avers, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of David S. Grice, while to transfer the trial to Boston, Massachusetts, would not in any adequate measure raise this

crucial question for disposition, which deponent avers is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ MARY B. GRICE

Sworn to and subscribed before me this 8th day of December, 1961.

/s/ GEO. J. YOUNGFLEISH,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires February 1, 1965.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF NORTHUMBERLAND } *ss.:*

EDNA E. LONG and LAURA MANNEY, being duly sworn according to law, do hereby depose and state that they are citizens and residents of Elysburg and Shamokin, County of Northumberland, Pennsylvania, respectively, and have been duly appointed administratrices of the estate of Shirley E. Reitz, deceased, by the Register of Wills of Delaware County, Commonwealth of Pennsylvania, and they aver, on information and belief, that said Shirley E. Reitz purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date she boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief they aver that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing Shirley E. Reitz to suffer severe and disabling injuries resulting in her death; upon information and belief deponents aver that almost all the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of her death, including the members of her family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia, Delaware and/or Northumberland Counties of Pennsylvania; upon information and belief deponents aver that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponents, precluding the production of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of Shirley E. Reitz; that upon information and belief

deponents aver that it will take a long period of time to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponents aver contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponents' claim which would prejudice deponents' right therein; deponents aver faith and confidence in deponents' attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponents have chosen as the direct and exclusive representative in the prosecution of deponents' claim; deponents further aver, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should apply the Pennsylvania law which prescribes no such limitation; in this regard, deponents further aver, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of Shirley E. Reitz, while to transfer the trial to Boston, Massachusetts, would not in any adequate

measure raise this crucial question of disposition, which deponents aver is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ EDNA E. LONG
/s/ LAURA R. MANNEY

Sworn to and subscribed before me this 8th day of December, 1961.

/s/ KATHERINE KALODY,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires February 28, 1965.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

DOROTHY WEINSTEIN, being duly sworn according to law, does hereby depose and state that she is a *citizen and resident of Philadelphia County, Commonwealth of Pennsylvania,* and has been duly appointed executrix of the estate of her husband, Ralph Weinstein, deceased, by the Register of Wills of Philadelphia County, Commonwealth of Pennsylvania, and she avers, on information and belief, that said Ralph Weinstein purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date he boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief she avers that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing Ralph Weinstein to suffer severe and disabling injuries resulting in his death; upon information and belief deponent avers that almost all of the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of his death, including the members of his family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia County of Pennsylvania; upon information and belief deponent avers that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponent, precluding the production of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of Ralph Weinstein; that upon information and belief deponent avers

that it will take a long period of time to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design, assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponent avers contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponent's claim which would prejudice deponent's right therein; deponent avers faith and confidence in deponent's attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponent has chosen as the direct and exclusive representative in the prosecution of deponent's claim; deponent further avers, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should apply the Pennsylvania law which prescribes no such limitation; in this regard, deponent further avers, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of Ralph Weinstein, while to transfer the trial to Boston, Massachusetts, would not in any adequate measure

raise this crucial question for disposition, which deponent avers is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ DOROTHY WEINSTEIN

Sworn to and subscribed before me this 4th day of December, 1961.

/s/ SYLVIA GLASSMAN,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires January 25, 1965.